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No. 73-227

In the

Supreme Court of the United States

OCTOBER TERM 1973

CONTINENTAL BAKING COMPANY,
Petitioner,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT OLD HOMESTEAD BREAD COMPANY IN OPPOSITION

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STATEMENT OF THE CASE

Old Homestead Bread Company ("Old Homestead") sought and acquired judgment against Continental Baking Company ("Continental") based upon separate jury verdicts, finding that Continental had violated four different provisions of the federal antitrust laws: conspiracy in restraint of trade (JA. 2726); attempting to monopolize (JA. 2727); conspiracy to monopolize (JA. 2728); and unlawful price discrimination (JA. 2729). All four verdicts were submitted to the Court of Appeals for its consideration and although that court

discussed only the unlawful price discrimination aspects of the case it clearly affirmed all four verdicts by its concluding remark:

> "There was indeed sufficient evidence before the jury upon which to base the *verdicts,* and we find no error in the various rulings by the trial court. The case is thus AFFIRMED." (Emphasis supplied) App. to Petition 27a.

Continental has sought review of the verdict based upon the violation of Section 2(a) of The Robinson-Patman Act amendments to the Clayton Act only and apparently does not seek review of the judgment based on the other three verdicts.

The parties to this action were the competing wholesale bakers serving the Colorado and Southeastern Wyoming market. Old Homestead, the only locally-owned bakery in the market, baked "Town Talk" bread; Continental, the world's largest baking company (X. 542), baked "Wonder" bread; Interstate Brands baked "Butternut" bread; and, the Rainbo companies baked "Rainbo" bread. The large retail chain stores, Safeway, King Soopers and Millers (National Tea), baked and sold their own bread and thus were not in the wholesale bakery business. JA. 478-79, 548, App. to Petition 8a. The majority of the independent grocers in the market were members of a cooperative called A.G. (Associated Grocers) and purchased their bread requirements from the wholesale bakers. JA. 479. The lead or volume product of all the wholesale bakers was the one pound loaf of white pan bread. JA. 476, 1041-42.

In 1962 Continental built and opened the largest bakery in the Rocky Mountain area (X. 502, JA. 739), which was more than twice the size of its previous two bakeries combined (JA. 1532, 1538), in spite of its knowledge that this new plant would be running at no more than 50% of its capacity based on production figures available at the time (JA.

1538). Continental had to run its new plant substantially in excess of 50% of its capacity to make a profit. JA. 1695-96.

Prior to August of 1964 the wholesale bakers all merchandised their products through route salesmen, who competed for preferred position and adequate space on the bread rack in each store served. JA. 474-76. Adequate preferred space was a critical prerequisite to the successful merchandising of bread and was obtained by securing the good will of each store manager through prompt and courteous service. JA. 475-76, 793, 1253.

Although A.G. had previously asked, the wholesale bakers had refused to provide a private label bread program (JA. 524), because of the bitter wholesale price war that would result from any attempt by one baker to tie up the majority of bread purchasers in the market (JA. 560-61, 719, 726-27).

Continental needed volume of sales (JA. 776, 1695-96), and A.G. wanted a private label bread program which would provide its members with greater profits (JA. 686). In the summer of 1964 Continental began increasing its volume of sales and A.G. acquired its private label bread program through what became known as the "Tender Crust Program."

An affiliated corporation of A.G. was formed called Five States Supply Co. ("Five States"). X. 764-67, JA. 579. Upon payment of a $100 fee (X. 822, JA. 626) and the execution of a statement binding the applicant to covenants set forth in the Company by-laws (App. 1a), a member of A.G. could join Five States (JA. 591). These covenants required all members to give first position on their bread racks to the private label baked by Continental (Tender Crust) and second position to the Continental's advertised products (Wonder) (X. 753, JA. 579) and, that they keep the price of Tender Crust ". . . so that it will always be offered [to the public] at the same price of any other bakery products of the same quality, weight or size" (X. 753, JA. 579).

Five States and Continental entered into a written agreement (App. 3a), which provided that the wholesale price of Tender Crust to the retail grocery store member of Five States would be at least one cent per loaf less than the price charged for Wonder products (JA. 754-55, 773, 841-42, 846, 866, 881-82, X. 852, JA. 600). And further, the wholesale price of the Wonder products would always be maintained at the wholesale prices of Continental's competition (JA. 755, 841-42, 846, 866, 881-82), that is, Rainbo, Old Homestead and Interstate. As a result, the profit to the grocer was always at least one cent greater on Tender Crust products than on the products of any competitor of Continental. JA. 623-24, 686-87, 1266. Under the Tender Crust program there clearly were no price benefits available to the public.

The Board meetings of Five States were frequently attended by Continental personnel (X. 673, 676-77, 712-13, 730, JA. 579), and its weekly newsletters were typed and mailed by Continental to all member grocers after the contents thereof were reviewed and discussed by representatives of Continental (JA. 614-15, X. 770-821). New Members solicitation meetings were held by Five States at the Continental plant with representatives of Continental urging membership. JA. 625-27, 674. In 1965, 112 grocers joined the program; by February of 1967 there were 167 members; and in January of 1968, the membership had grown to 200 members, out of a total of 415 eligible A.G. stores. X. 775, JA. 616, X. 833-42, JA. 588.

Immediately after the Tender Crust program began, Continental's competitors reduced prices (JA. 761, 1955), gave discounts, introduced private and secondary labels and employed other defensive tactics (JA. 971, 1167-68, 1191-92). Continental, in addition to granting discounts, would always match the price of its competition with its Wonder products, then sell its Tender Crust products to the grocer at least one cent be-

low the price of its Wonder products. JA. 971, 981. The wholesale prices of bread plummeted as did the volume sold by Old Homestead. JA. 796, 934. The wholesale price of the one pound loaf went from 20.5 cents in July of 1964 to 13.2 cents in the fall of 1967. JA. 915-16, X. 843, JA. 742.

Between July of 1964 and January of 1968, Continental's volume of sales went from 27.7 million pounds to 40.8 million pounds, and its receipts from $5.1 million to $7.3 million. X. 827. Between 1963 and 1966 Continental lost money at its Denver plant. X. 823, JA. 2099. In 1967 it made a modest profit of $14,000. Nationally, Continental profits were in the millions of dollars for all years. X. 823. In contrast, and as noted by the Court of Appeals (App. to Petition 12a) Old Homestead's volume of sales went from 22.8 million pounds in 1963 to 5 million pounds in 1967 and its dollar sales from $4.1 million in 1963 to $900,000 in 1967. X. 432, JA. 518.

Predictably (JA. 1034, 1265-67), Continental's only local competitor (JA. 474), Old Homestead, after successfully serving the market since 1892 (JA. 801) closed its doors and left the industry on December 31, 1967 (JA. 515). Two days later Continental removed all discounts and raised its prices on all products. JA. 919-20.

REASONS FOR DENYING THE WRIT

The holding below does not pose any substantial issues of federal law or public policy. Nor does it, as Continental contends, represent an attack on the institution of private label merchandising. Only Continental's peculiar methods of misusing the private label system for predatory purposes were at issue in this case. Continental's private label program not only failed to afford any benefit whatsoever to the consumer but it actually prevented price competition at the retail level, by requiring retail grocers to sell all of their bread loaves at the same price, regardless of differences in cost or label. Moreover, there are no conflicts between the decision in this case and the decisions of any other United States court of appeals,

as an analysis of the decisions and the evidence of record will demonstrate.*

Further, since Continental attacks but one of the four antitrust verdicts against it, no useful purpose would be served by consideration of the single verdict now being assailed.

I.

THE EVIDENCE IN THE RECORD AMPLY DEMONSTRATES THE CAUSAL CONNECTION BETWEEN CONTINENTAL'S UNLAWFUL PRICE DISCRIMINATION AND OLD HOMESTEAD'S INJURY, AND THERE EXISTS NO CONFLICT BETWEEN THE HOLDING OF THE COURT BELOW AND THE FIFTH CIRCUIT'S HOLDING IN THE *BORDEN* CASE.

Continental has made an imaginative attempt to create a phantom conflict between two circuits in this case. The alleged conflict is said to exist between the holding of the Fifth Circuit in *Borden Co. v. FTC,* 381 F.2d 175 (5th Cir. 1967), and the ruling of the Tenth Circuit in the present case on the question of causal connection between the price discrimination and the injury to plaintiffs. In *Borden* the Fifth Circuit commented by way of dictum that among several other deficiencies in the case against Borden the evidence had shown that "Borden did not subsidize below-cost or unrealistically low prices on its private label milk with profits received from sales of the Borden brand." 381 F.2d at 177.

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*Continental's statement that Plaintiff's damage theory "was supported solely by assumptions of Plaintiff's counsel which were totally without support in the record" is palpably erroneous. Plaintiff's damage theory is supported in law by this Court's decision in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), and in fact by the following references: JA. 506-509, 742-44, X. 428-36 JA. 1224, 1452, 1457, X. 843-47, JA. 742.

In the present case the Tenth Circuit did not discuss the question of subsidization, for it found that "the record shows that both plaintiffs suffered some injury during the complaint period" and that "taking the record as a whole, the jury could easily infer that Continental's price discrimination incorporated in the Tender Crust program was the proximate cause" of the plaintiffs' injuries. App. to Petition, 10a. It may thus be seen that the "conflict" which Continental so dramatically emphasizes lies between a comment on the evidence or a dictum by the Fifth Circuit and the fact that the Tenth Circuit did not even feel the need to discuss whether there was or was not a "subsidization."

Continental's primary argument is that there was no relationship or "causal nexus" between the damages suffered by Old Homestead and the differences in prices charged by Continental for its private and advertised label breads respectively. Petition, 2, 5, 6, 9-12, 14.

This is, indeed, an ostrich-like position for Continental to take, for it is precisely this price differential that prevented any wholesale baker in the market, including Old Homestead, from competing with Continental. JA. 1285-87. The very keystone of the "Tender Crust" program was Continental's absolute guarantee that its private label products would always be priced at least one cent per unit less than its advertised label products (JA. 623, 755-56, X. 723, JA. 579), no matter what the cost (JA. 841-42).

This price differential must be considered in context, however. The by-laws of Five States contained the price stablization provision (App. 1a) that the retail price of Tender Crust would be the same as the retail prices of all advertised products. Continental, of course, was well aware of this by-law provision; its representatives had even discussed it with the Board of Five States on several occasions. JA. 620-21. Being familiar with the by-laws of Five States, it took

little imagination on Continental's part to insert the following provision in the "Tender Crust" private label agreement:

> "13. In the event prices on any of our regular advertised products shall, in response to, a general price decrease in any market fall below the prices in effect as of June 1, 1964, then any private label price set forth in paragraph 7, 8, and 9 shall be reduced in that market to a price *at least 1 cent below* the price on our comparable advertised items." (Emphasis added.) X. 852, JA. 600. App. 6a.

It was also understood that Continental would always keep the per unit wholesale price of its advertised label products equal to the price of its competitors' products (JA. 755, 841-42, 846, 866, 881-82) and, in accordance with the by-laws of Five States, each member was required to charge the same retail price for all products of the same size and quality regardless of label or baker (X. 753, JA. 579, X. 822, JA. 626). In this context, only one result could obtain: the grocer would always make at least one cent more profit on the sale of Tender Crust bread than any other label bread on the market. JA. 648, 708, 756, 846, 1266, 1287. This one cent or more guaranteed price differential arises out of the difference in price between Continental's advertised label products and its Tender Crust products. App. 6a. As the program was administered, if any other baker in the market attempted to *meet* the wholesale price of "Tender Crust" by lowering the price of its own bread, Continental would, under the Tender Crust program, lower the price of its advertised label bread to "meet competition" and lower its "Tender Crust" prices at least one cent under the advertised label price, thus *beating* competition in every case. JA. 648, 672, 773, 841-42, 846, 850-52, 866, 881-82, 981. On one occasion, the price of bread dropped one cent per day for a week: Rainbo dropped the price of its secondary label bread to meet the price of Tender Crust, then Continental dropped the price of its advertised label Wonder bread to meet Rainbo's secondary label price

and the price of Tender Crust was automatically dropped one cent below. JA. 881, 981.

It was this one cent or more price differential, provided for in the "Tender Crust" private label agreement, therefore, that made it impossible for Old Homestead or any other wholesale baker in the market to compete with Continental. JA. 648, 672, 1266, 1287. It requires no surfeit of imagination to conclude, as did both the jury and the court below, that there was clearly a proximate causal connection between Continental's price discrimination and Old Homestead's injury. App. to Petition 10a.

In addition to these facts in the record leading to the inevitable conclusion that Continental's price differential caused Old Homestead's injury, it is significant to note that there was ample evidence of predatory behavior on the part of Continental, including sales below cost. JA. 1649, X. 113-115. The Court of Appeals acknowledged the evidence in the record from which a strong inference of predatory intent on the part of Continental could be drawn. App. to Petition, 9a-10a.

By significant contrast, in *Borden Co. v. FTC,* 381 F.2d 175, 177 (5th Cir. 1967), the court concluded quite explicitly that "Borden is not in any sense guilty of predatory behavior. . . ." The importance of this factual distinction is aptly capsulized in the following statement of this Court in *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685, 702 (1967):

> "Courts and commentators alike have noted that the existence of predatory intent might bear on the likelihood of injury to competition."

See also, *Anheuser-Busch, Inc. FTC,* 289 F.2d 835 (7th Cir. 1961); *Cornwell Quality Tools Co. v. C.T.S. Co.,* 446 F.2d 825 (9th Cir. 1971).

The different results in the present case and *Borden* are easily reconciled by recognition of the principle enunciated by the Federal Trade Commission in *Beatrice Foods Co.*, (1967-1970 Transfer Binder) Trade Reg. Rep. para. 19,045 (FTC 1969), *aff'd. sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir. 1971), *cert. denied*, 404 U.S. 871 (1971):

> ". . . a finding of primary line injury might be based either on proof of predatory intent or on a market analysis, sufficient under the circumstances of the case to raise a reasonable probability of injury to competition. *National Dairy Products Corp. v. FTC*, 412 F.2d 605, 612-13 (7th Cir. 1969)."

Both the present case and the *Borden* case reflect an application of this principle to the facts of each case. In *Borden* (as in *Beatrice*) there was no evidence of predatory intent while in the present case the record was replete with such evidence. The decisions are comfortably compatible rather than in a "square conflict" as Continental would have this Court believe.

The Fifth Circuit's single comment upon the evidence in *Borden* to the effect that Borden did not subsidize below cost or low price sales on its private label milk with profits from its sales of advertised label milk can hardly be read as a holding that proof of subsidization is a *sine qua non* of liability under the Robinson-Patman Act. Indeed that suggestion was categorically rejected by the Seventh Circuit Court of Appeals in *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277, 285 (7th Cir. 1966):

> "Petitioners urge that there can be no violation of Section 2(a) in area price discrimination cases unless the Commission finds that the higher prices elsewhere support the lower prices in the market under examination. We have been cited to no authoritative decision to support this view. No such requirement was enunciated

> in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145, or *E. B. Muller & Co. v. Federal Trade Commission*, 142 F.2d 511 (6th Cir. 1944). Congress and the cases assume that the 'higher price to purchasers supports the lower price to others'. . ."

The critical distinction between the cases such as the present one and *Fry Roofing* on the one hand, and *Borden* and the other decisions relied upon by Continental on the other hand is that in the former there was evidence of predatory intent or behavior while in the latter there was a total absence of such proof. The omission of evidence of predatory intent was recognized by the respective courts in *Borden Co. v. FTC*, supra; *Shore Gas & Oil Co. v. Humble Oil & Refining Co.*, 224 F.Supp. (D.N.J. 1963); and *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F.Supp. 796 (S.D. Cal. 1952), aff'd. 231 F.2d 356 (9th Cir. 1955), *cert. denied* 350 U.S. 991 (1956), *rehearing denied* 351 U.S. 928 (1956). This factual distinction and its importance have been emphasized by commentators. See, for example, 16C von Kalinowski, Business Organizations, §29.03[4], p. 29-92-29-93, fn. 99 where it is concluded, following a discussion of the decisions, that proof of predatory intent "clearly establishes the requisite nexus between the price discrimination and the competitive injury."

Since Continental's position is primarily based upon its expansive reading of the dictum in the Fifth Circuit *Borden* decision, a close scrutiny of the evidence in that case is both necessary and instructive. Incredibly enough, Continental ventures the bold and conclusory proposition that "the facts of this case are indistinguishable" from those in Borden. Petition, 11. The deceiving inaccuracy of this statement is highlighted by the following comparative analysis:

> (1) Borden did not charge "below-cost or unrealistically low prices on its private label milk . . ." 381 F.2d at 177. Continental sold at prices below cost for extended periods. JA. 1649, X. 113-15.

(2) Borden was "not in any sense guilty of predatory behavior similar to that which may accompany territorial price wars." 381 F.2d at 177. The Court of Appeals in the instant case expressly acknowledged the existence of evidence of predatory behavior in the record, including sales below cost (JA. 1649, X. 113-15, JA. 1632), discriminatory price cuts "represented by discounts to Tender Crust customers only," (JA. 590-91, 928-29), as well as the evidence that Continental set for itself and accomplished the seemingly impossible goal of increasing production by 50% in four years in order to operate its oversized Denver plant at a profit (JA. 823, 930, 2078, 2080, X. 823, JA. 2099). The Court of Appeals found this achievement indicative of more than "fierce competitive instincts." App. to Petition, 10a. Another significant fact evidencing predatory intent was Continental's price raise and abolition of discounts merely two days after Old Homestead had ceased to do business. JA. 919-20. The Court of Appeals noted the existence of other evidence as well which would create a "strong inference" of predatory intent by Continental. App. to Petition, 10a.

(3) The *Borden* case did not "involve any device similar to the conventional volume discount." 381 F.2d at 177. Continental employed such a device in the form of its so-called weekly specials which clearly constituted a thinly-disguised discriminatory allowance in favor of the A.G. stores. JA. 694-95.

(4) In *Borden,* "all of Borden's customers, large and small alike, paid the same prices for the Borden brand milk or for the private label milk." 381 F.2d at 177. In the present case the Tender Crust private label bread and its special pricing schedule were made available by Continental only to A.G. stores who were members of Five States and who were thus willing to accept the strictures imposed by Continental (JA.

591, 765, X. 822, JA. 626), including the requirement that Tender Crust be given the preferred rack position and Wonder the second best position (X. 850, JA. 579). Moreover, Continental's other private label breads were not made available at the same price and on the same basis as Tender Crust. JA. 912. Finally, a vast number of customers purchased Wonder bread at the regular list price rather than the lower price offered to the purchasers under the Tender Crust program. JA. 2074-75.

(5) The evidence in *Borden* demonstrated that "Borden's practices did not lead to a substantial increase in Borden's market position at the expense of [its] competitors." 381 F.2d at 179. The practices of Continental permitted it to increase its tonnage of sales from the Denver plant by a phenomenal 50% and its increase in market share by 15% resulting in a 51.5% of the market as noted in the opinion of the Court of Appeals. App. to Petition, 8a, JA. 853. This increase was manifestly at the "expense of its competitors" as dramatically illustrated by the fact that Old Homestead, the only true independent in the market, was driven out of business altogether. JA. 907-08.

The record in the instant case so overwhelmingly dispels any suggestion that the *Borden* case is factually "indistinguishable" that one may safely conclude that the only notable similarity between the cases is the fact that they both involved private label products.

Continental consistently attempts to characterize the Court of Appeal's ruling as an all-out frontal assault on the whole concept of private labeling. For example, Continental inaccurately frames the issue in the case as "the degree to which . . . [the Robinson-Patman] Act may be construed to prevent sellers from passing along to their customers the cost savings inherent in private label merchandising." Petition, 8, 9.

Old Homestead has no quarrel with the basic institution of private label merchandising—but only with the predatory and piratical abuse of the institution of which Continental has been guilty. This Court has not been deceived by the bold suggestion that private label programs are entilted to an automatic immunity status under the federal antitrust laws.

For example, in *FTC v. Borden Co.,* 383 U.S. 637, 646 (1966) this Court concluded:

> "The arguments for exempting private brand selling from §2(a) [of the Clayton Act as amended by the Robinson-Patman Act] are, therefore, more appropriately addressed to the Congress than to this Court."

Similarly, in the very recent holding in *United States v. Topco Associates,* 405 U.S. 596, (1972) this Court flatly rejected the notion that private label programs, no matter how conducted, are endowed with an aura of per se legality under the antitrust statutes.

By quoting out of context, Continental has tried to characterize the holding of this Court in *FTC v. Borden Co.,* 383 U.S. 637 (1966) as being favorable to the concept of private label programs. The following statement is from page 14 of Continental's Petition:

> "[T]his Court itself has characterized the provisions of the Robinson-Patman Act that are applicable to the sale of private label products as being 'flexible . . . provisions' that may take account of the difference between 'branded and unbranded commodities,' " quoting from 383 U.S. at 646.

Compare the generality and coloration of Continental's statement with the actual language of this Court in *Borden:*

> "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal

> recognition in the more flexible 'injury' and 'cost justification' provisions of the statute.' " 383 U.S. at 646, quoting from Report of the Attorney General's National Committee to study the Antitrust Laws 159 (1955).

This Court was simply saying that if any special consideration were to be afforded private label pricing, such consideration would have to be pleaded under one of the Act's *defense* provisions. The private label concept would not prevent a finding of a prima facie violation. As this Court's quotation makes clear, special recognition would only be given private label pricing where the price differential reflected "tangible consumer preferences." Continental's pricing scheme in the present case has nothing to do with consumer preferences and indeed even stifles this notion; for although Continental sold its Tender Crust bread to the Five States stores at a price guaranteed to be one cent lower than the price of Wonder bread, the by-laws of Five States required that the two brands of bread be resold at retail to the housewife at *identical* prices. X. 753, JA. 579. Indeed this provision was at the very core of Continental's scheme. Consumer preference is thus completely absent from this case, which involves discrimination and injury at the primary level rather than a differing price structure between private labeled advertised products at the secondary or retail level.

It is absurd to suggest, as does Continental, that the decision in the present case dealt a death blow to private label marketing. Indeed it is the contrary result which would have been shocking and economically destructive, for it would mean that a national giant such as Continental could stage predatory and even fatal wars on its local competitors, provided it fought behind the banner of the private label. Moreover, Continental is hardly in a position to analogize itself to or champion the cause of "smaller grocery stores" (Petition, 9), or "small independent retailers" (Petition, 14). The Court of Appeals' decision, like the ruling of this Court in *Topco,* merely vindicates

the overriding policy of the Sherman and Clayton Acts— anti-competitive and predatory conduct, under whatever guise, will not be condoned.

Although the evidence abundantly established the causal nexus between Continental's price discrimination scheme and Old Homestead's injury, and although the existing state of law does not require any additional showing of "subsidization", the record does demonstrate that Continental had a sufficient national "treasury" to enable it to finance its warfare and absorb losses in the Denver market. cf., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 118 (1954). While Continental's Denver bakery lost eighty thousand dollars in 1964, one hundred seventy-nine thousand dollars in 1965 and two hundred fifty thousand dollars in 1966 during the Tender Crust Program, its national bakery operations showed an average yearly profit of approximately fifteen million four hundred thousand dollars during these three years. X. 823, JA. 2099.

II.

NEITHER THE EVIDENCE NOR THE APPLICABLE LAW SUPPORTS CONTINENTAL'S CONTENTION THAT IT MAY AVOID LIABILITY ON THE GROUND THAT THE PRIVATE LABEL PRICING WAS "AVAILABLE" TO ALL OF ITS CUSTOMERS.

Continental contends that it cannot be held liable because both its advertised label and private label breads were made "available" to all of its customers.

This "availability" argument is deficient in two respects: the law and the facts. From a factual standpoint the record is simply barren of any evidentiary showing of "the full availability of both the lower priced private label and the higher priced advertised bread to all purchasers." Petition, 17. On the contrary, the evidence demonstrated that Continental offered its Tender Crust private label program only to A.G. stores. This fact was openly admitted. JA. 693, 765, 928.

Beyond this, "Continental served approximately 253 charge account customers from its Denver bakery who purchased Wonder label bread . . . at the regular list price" (i.e., rather than at the special prices prevailing to those in the Tender Crust program). JA. 2075.

Moreover, the conditions and strictures which Continental attached to its proposal to sell the private label bread to even the A.G. stores dispel any notion that both breads were "available," within any commonly accepted and reasonable meaning of the word. The opinion of the Court of Appeals expressly acknowledged the "unavailability" of the private label program in view of the fact that the A.G. customer, in order to be eligible for the program, had to become a Five States member and accept the following conditions and requirements imposed by Continental:

> "These requirements included a membership fee of $100.00, an agreement to give Tender Crust bread the best shelf space, with the second best to Continental's advertised label and to participate in the promotion of weekend specials. We find no basis to apply the availability doctrine." App. to Petition, 16a.

At this juncture Continental apparently does not argue with the fact that it did not offer its Tender Crust label program to all of its purchasers. However, it now argues that it offered bread "under a variety of private labels to all buyers in the market at the established private label price." Petition, p. 18.

The patent fallacy of this argument is that Tender Crust bread was not sold at the so-called "established private label price," i.e., the price shown in X.. 915 upon which Continental relies in staging this argument. Instead, the Tender Crust bread was sold at various discount rates rather than at the list price. JA. 587, 845. Thus, under the Tender Crust agreement (X. 885, JA. 600) there was a 2% central billing dis-

count in effect (X. 886, JA. 600), along with a monthly volume discount of from 7% to 11% (X. 886, JA. 600), both of which discounts were applied to the Tender Crust list price. The net result was that while Wonder bread was being sold at sixteen cents per unit and Continental's other private label products were being sold at fifteen cents per unit, the Tender Crust bread was, as a result of the discounts, being sold at approximately 13.5 cents per unit.

Thus, even assuming arguendo that some private label bread was available to all of Continental's customers, the Tender Crust discount pricing was clearly *not* available to all of the purchasers, and this argument is again totally precluded by the facts of record.

Although the evidence at trial provided no underpinning for consideration of Continental's "availability" defense, and although (as the discussion below will demonstrate) the applicable law does not permit use of such a defense in a case such as the present one, the trial court, in an apparent abundance of caution, actually instructed the jury that there would be no violation if the Tender Crust private label bread was "offered indiscriminately to everybody . . ." JA. 2659. The jury, like the Court of Appeals, obviously found Continental's availability claim to be factually unsupportable.

From a legal standpoint it is imperative to stress that the so-called "availability" doctrine is not applicable in a case involving injury at the seller level; i.e., the primary line of competition. See 16C von Kalinowski, Business Organizations §29.03 [3] at p. 29-87:

> "To date, . . . the 'availability' doctrine has not been successfully invoked in any primary line proceeding. Perhaps the principal reason is that while the availability of the lower price might negate competitive injury to buyers to whom the lower prices are readily available, it is, according to one view, 'more difficult logic-

> ally to conclude that competing sellers have not been injured merely because buyers had available to them the lower prices of the challenged seller.'" (Quoting Attorney Gen. Rep. 127, n. .20 (Supp. 1968)).

This logical rule was recognized in the quite recent ruling of the Court of Appeals of the Fifth Circuit in *Hampton v. Graff Vending Company*, 478 F.2d 527, 534 (5th Cir. 1973) and the court rejected the defendant's availability argument:

> "Based on the findings of the district court, Graff has continued to assert that no discrimination occurred because the sale price was available to Hampton. This secondary line argument carries no weight in a primary line case." 478 F.2d at 534. fn. 12.

The Court of Appeals in the present case also noted this legal principle: see App. to Petition, 159.

In summary, the evidence at trial refuted rather than supported Continental's contention that both its private label and advertised label breads were available to all purchasers, and, as the Court of Appeals recognized, there is neither factual nor legal support for this contention. As far as the present proceeding is concerned the "availability" defense is simply not available.

III.

THE THREE ADDITIONAL UNREVERSED VERDICTS IN FAVOR OF OLD HOMESTEAD BASED ON VIOLATIONS OF THE SHERMAN ACT PROVIDE A STRONG ADDED GROUND FOR DENIAL OF REVIEW.

Rule 24(1) of The Supreme Court Rules provides that a respondent shall file "an opposing brief disclosing any matter or ground why the cause should not be reviewed by this Court."

An additional reason why this cause should not be reviewed is that the judgment under attack is supported by four separate verdicts and Continental has attacked only one of such verdicts. If Continental desired a reversal as to Old Homestead it should have brought all four verdicts to this Court. As it has failed to do so, its petition for certiorari based on but one of the verdicts should be denied.

CONCLUSION

For the reasons herein stated the Petition for Certiorari should be denied.

Respectfully submitted,

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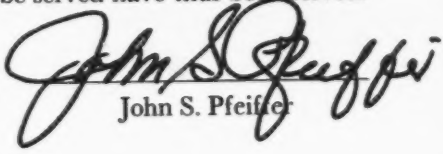
Dated: August 30, 1973

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Brief in Opposition to Petition for Writ of Certiorari on Continental Baking Company and on Interstate Brands Corp. by mailing three copies of the same, airmail postage prepaid, to their respective counsel of record, John H. Schafer, 888 16th Street, N.W., Washington, D.C. 20006, E. Edward Bruce, Covington & Burling, 888 16th Street, N.W., Washington, D.C. 20006 and Edward L. Foote, Winston, Strawn, Smith & Patterson, First National Bank Building, Chicago, Illinois 60603. All parties required to be served have thus been served.



John S. Pfeiffer

August 30, 1973

APPENDIX

(Portion of Plaintiff's Exhibit #52 X752-753)

Article III of the By-Laws
Five States Supply Co.

COVENANTS OF MEMBERS

The members recognize that one of the primary purposes of this Corporation is to foster, promote and encourage the business of supplying its members with bread and bakery products for resale to the retail public, and to reform abuses in said business and to secure for such members freedom from unjust and unreasonable exactions. The members also recognize and agree that this Corporation has secured the exclusive use of the trade and service mark "Tender Crust" for their benefit and each member agrees, in consideration of the agreement of the other members, to use his best efforts to establish the name "Tender Crust" in order that there will be a demand in the retail trade sufficient to create the sale of "Tender Crust" bread and other bakery products equal to that of national and local bakery brands.

In consideration of these premises the members agree that they will each use their best efforts as members of this Corporation to promote the aims and purposes thereof and agree specifically that they are duty bound to and will promote the "Tender Crust" bakery label at all times and in every possible manner including the following:

1. To buy and resell "Tender Crust" label bakery products and assist and give their best effort in presenting, maintaining and enlarging the sale of "Tender Crust" label bakery products for their own benefit and

for the benefit of all other members hereof who also handle such label.

2. To always provide fresh bread on the regular bread rack.

3. To give first position on the regular bread rack to "Tender Crust" label bakery products.

4. To devote % of space on the regular bread rack to "Tender Crust" label bread.

5. To give second position on the regular bread rack to the bakery products carrying the label of the baker or manufacturer providing or baking "Tender Crust" products.

6. To take particular care of the bread rack at all times in order that the "Tender Crust" section shall always be neat, clean and orderly.

7. Each member agrees that said "Tender Crust" label bread shall always be on consignment to the member and ownership thereof and title thereto shall remain in the Company until disposed of by a member in the ordinary course of retail trade.

8. Each member agrees that, in order to maintain and keep "Tender Crust" bakery products in a competitive price position, he will, upon notice to him from any other manufacturer of other bread products, of any change of price, whether decrease or increase, immediately change the retail price of "Tender Crust" so that it will always be offered at the same price of any other bakery products of the same quality, weight or size.

(Plaintiff's Exhibit 124A-D X 849-852)

Five States Supply, Inc.
Denver, Colorado

Gentlemen:

In view of the recent competitive developments in our market we wish this letter to serve as our written offer to you on a private label arrangement. This confirms recent oral offers made by us with reference to our supplying your member stores with bakery products carrying your own brand name. These products will be produced by us at our Denver, Colorado Bakery and will be sold to your member stores in accordance with the following terms and conditions:

1. All bakery products sold to you pursuant to this contract will be of quality comparable to our regular Wonder and Hostess Products. Formulations will be made by us in consultation with our Research and Development Laboratories.

2. All packaging and labels will be supplied by us subject to your prior approval.

3. We will assist your personnel in the proper display and promotion of all products. When advisable, we will supply point of purchase material and dislocated displays to accomplish this aim. Sampling and in-store demonstrations will be used from time to time at our discretion. Five States Supply agrees to use their best efforts causing their members to cooperate with us in these activities. Qualified and experienced sales personnel will be assigned by us to assist your member stores in the above program.

4. You agree to make available to us adequate preferred space on your member bakery products racks for the display of our regular Bread, Cake and

Sweet Goods products so that the full sales potential of these advertised brands can be realized. You agree in requesting your members to cooperate with us in arranging special weekly promotions on said advertised brand items.

5. Deliveries of all products to your member stores pursuant to this agreement shall be made by our regular Wonder and Hostess route salesmen from their regular delivery trucks. We will give complete rack service and will be responsible for all stale returns.

6. Introduction into your member stores of products listed below will be made as soon as practical after August 10, 1964. At any time during the existence of this contract, we will discuss with you the addition of other items to be sold hereunder.

7. You agree to pay us for products produced and delivered under this contract at the following prices on weekly credit terms.

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.175	.185
1¼ Pound Round-Top Bread	.22	.235
1¼ Pound Sandwich Bread	.22	.235*
8 Pack Cluster Buns	.21	.23
8 Pack Coffee Buns	.21	.23

The above prices will apply to both White and Wheat Bread if there are both varieties in the same weight category.

*This price was not in effect on June 1, 1964 but will be considered to have been in effect on that date for the purposes of this contract.

8. In the event you wish to purchase products with no stale returns to be absorbed by us, the prices will be as follows:

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.16	.185
1¼ Pound Round-Top Bread	.195	.235
1¼ Pound Sandwich Bread	.195	.235
8 Pack Cluster Buns	.20	.23
8 Pack Coney Buns	.20	.23

9. In the event you wish to purchase products on a drop-shipment basis to each of your member stores whereunder you will be responsible for rack service and stale returns, prices will be as follows:

Variety	Price	Advertised Brand Price as of June 1, 1964
1 Pound Expanded Bread	.15	.185
1¼ Pound Round-Top Bread	.185	.235
1¼ Pound Sandwich Bread	.185	.235
8 Pack Cluster Buns	.19	.23
8 Pack Coney Buns	.19	.23

10. All products hereafter sold by us to you pursuant to this agreement are hereby guaranteed not to be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, as amended, or any substantially similar state law. We agree to indemnify you against any claims made against you or losses sustained by you arising out of the purchase or use of products covered by this agreement provided such claims or losses do not result from your negligence or that of your agents and